

**HEBEI METALS & MINERALS IMPORT & EXPORT CORPORATION AND HEBEI
WUXIN METALS & MINERALS TRADING CO., LTD. v. UNITED STATES**

Court No. 03-00442

Slip Op. 05-32 (Ct. Int'l Trade March 10, 2005)

**FINAL RESULTS OF REDETERMINATION
PURSUANT TO REMAND**

SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (the Court) in Hebei Metals & Minerals Import & Export Corporation and Hebei Wuxin Metals & Minerals Trading Co., Ltd. v. United States, Slip Op. 05-32 (Ct. Int'l Trade, March 10, 2005) (Hebei Metals II). The Court remanded the Department's Final Results of Redetermination Pursuant to Remand, Hebei Metals & Minerals Imp. & Exp. Corp. and Hebei Wuxin Metals & Minerals Trading Co., Ltd. v. United States (Department of Commerce, Oct. 20, 2004) (First Remand Redetermination) with respect to the surrogate value of coal.

Specifically, the Court ordered the Department to re-open the record to add evidence with respect to the surrogate value of coal, and issued the Department specific instructions on adding relevant information to the record regarding the type or types of coal used to dry lawn and garden steel fence posts (fence posts) in India, the People's Republic of China (PRC), and/or the respondent Hebei Metals & Minerals Import & Export Corporation and Hebei Wuxin Metals & Minerals Trading Co., Ltd. (collectively "Hebei"). The Court also ordered the Department to adhere to its conditional preference for domestic surrogate data or state that it is deviating from this practice, and provide a rational explanation for doing so. See Hebei Metals II at 23-24.

In accordance with the Court's instructions, the Department has reconsidered its analysis of the use of the Monthly Statistics of Foreign Trade of India (Indian Import Statistics) for the surrogate coal value it used in the Final Determination of Sales at Less Than Fair Value: Lawn and Garden Fence Posts from the People's Republic of China, 68 FR 20373 (April 25, 2003), and the accompanying Issues & Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Lawn and Garden Steel Fence Posts from the People's Republic of China (April 18, 2003) (collectively, Final Determination) of this proceeding with respect to the specific points which the Court addressed. After independent research, the Department has found that the 2001/2002 Tata Energy Research Institute's (TERI) Energy Data Directory & Yearbook (TERI Data¹), placed on the record by Hebei, is in fact exclusive of duties and taxes, and is the best source of data for a surrogate value for coal in this proceeding.

However, the Department could not determine the characteristics of the coal used by the respondent or the fence posts industry in India or the PRC. Pursuant to the Court's instructions in Hebei Metals II, the Department requested specific information from Hebei regarding the coal used by Hebei's subcontractor, or the fence post industry in India or the PRC. The respondent failed to produce any new probative factual information on the record regarding the type, grade or category of coal it used during the period of investigation (POI) to produce fence posts, or the type, grade or category of coal currently used in India or the PRC to produce fence posts. Additionally, the

¹ Within the context of this redetermination, the Department analyzed three different years of the annual TERI Data publication. Within the Final Determination, the 2000/2001 TERI Data was on the record. Within the context of the current redetermination, the respondent Hebei placed the 2001/2002 TERI Data on the record. This information is contemporaneous with the POI. While conducting independent research on domestic coal prices in India, the Department placed the 2002/2003 TERI Data on the record.

Department could not locate this information through independent research. Consequently, the Department cannot make a specific determination as to which value or values within the TERI Data most closely represent the type of coal used by Hebei during the POI. As a result, the Department must resort to the application of facts available for the valuation of coal.

The Department finds that an adverse inference is appropriate in applying facts available because Hebei did not cooperate to the best of its ability to provide the information requested by the Department. Based on the independent research performed by the Department regarding the TERI Data, the Department has determined, given all possible coal values available, that the TERI Data is the best available information on the record to value coal in this segment of the proceeding. The Department has determined, as adverse facts available (AFA), to use the simple average of coal grade A for “*steam coal and rubble*,” from the more contemporaneous 2001/2002 TERI Data placed on the record by Hebei within the context of this redetermination. Finally, the Department also reiterates its policy of selecting surrogate values on a case-by-case basis, in accordance with the Department’s criteria for selecting surrogate values.

BACKGROUND

In the investigation of fence posts from the PRC, covering the POI October 1, 2001, through March 31, 2002, the Department determined that Hebei sold its products at less than fair value. In its normal value calculation, the Department used Indian Import Statistics to calculate the surrogate value for coal. See Final Determination at 68 FR 20376.

The Court remanded the Department’s selection of the Indian Import Statistics for coal rather than the 2000/2001 TERI Data domestic coal prices for steam coal placed on the record by

respondent Hebei, because the Court found that the Department's determination was not based on substantial evidence. See Hebei Metals & Minerals Import & Export Corporation and Hebei Wuxin Metals & Minerals Trading Co., Ltd. v. United States, Slip Op. 04-88 (Ct. Int'l Trade July 19, 2004) at 16 (Hebei Metals I). The Court also found that the Department did not identify a sustainable distortion in the Indian domestic coal market or explain how import coal values best approximate the cost incurred by Indian fence-post producers. Id. at 15-16. Additionally, the Court asserted that the Department's statement that the import coal values were contemporaneous and "free of taxes and duties" was not sufficient because it did not address whether taxes and duties distorted the Indian domestic coal market. Id. at 15. On remand, the Court instructed the Department to either provide further explanation based on record evidence or conduct further investigation to determine whether Indian import or domestic data provides a value that more accurately reflects the coal-consumption patterns of producers in the relevant industry. Id. at 15-16.

Accordingly, after re-examining the record evidence, in the First Remand Redetermination, the Department determined again that it was appropriate to use the Indian Import Statistics to value coal because insufficient information was placed on the record by Hebei, with regard to the TERI Data domestic coal prices. In particular, the Department did not have information on the record regarding the grade, type and/or category of coal used by Hebei during the POI. See First Remand Redetermination at 15.

The Court has once again remanded the Department's selection of the 2000/2001 TERI Data domestic coal prices, and ordered the Department to re-open the record to add evidence with respect to the surrogate value of coal. The Court stated that the Department may add any relevant evidence,

but it must either: (1) seek evidence of the type of coal used by Hebei in its production process, and nonaberrational price data that best relates to this coal type, if the record does not already contain such data; or, if that is deemed impractical at this stage, (2) obtain evidence of the type or types of coal normally used for drying steel fence posts in the PRC or India and non-aberrational price data that best relates to such coal type(s), if the record does not already contain such data. See Hebei Metals II at 23-24.

In either scenario, the Court stated, the Department must adhere to its conditional preference for domestic surrogate data or the Department must state that it is deviating from this practice and provide a rational explanation for doing so. See Hebei Metals II at 24. The Court also stated that if the Department again decides to use the coal value in the Indian Import Statistics, it must (1) provide record evidence that this provision at least roughly corresponds to the type of coal used to dry steel fence posts; (2) determine whether the type of coal used by Hebei or a reasonably comparable type is reflected in the TERI Data; and (3) provide a reasonable explanation as to why the Indian Import Statistics data more accurately reflect the costs incurred in producing fence posts. Id. In any event, the Court has stated that the Department may not support the use of the Indian Import Statistics as the surrogate coal value on the basis of tax-exclusivity if there is no record evidence to indicate that the Indian coal market prices are distorted by taxes and/or duties. Id. Further, the Court has stated that the reasons thus far offered for the Department's choice of Indian Import Statistics in the Final Determination, and the First Remand Redetermination, have been found insufficient and will not sustain the choice. Id.

In accordance with the Court's instructions, on March 30, 2005, the Department sought further information to reconsider its analysis of coal used in the final determination of this proceeding, with respect to specific points addressed by the Court in Hebei Metals II. The Department identified areas in Hebei's factors of production (FOP) submission, dated January 3, 2003, for which the Department required further clarification. See Letter from the Department to Hebei, March 30, 2005 (1st Supplemental Questionnaire). Specifically, the Department asked Hebei to provide detailed information regarding the type and/or grade of coal it used during the POI to dry steel fence posts. The Department also asked Hebei to provide an industry expert chemical analysis demonstrating the useful heat value (UHV) of the type and grade of coal used by Hebei during the POI to dry steel fence posts. Finally, the Department asked Hebei to back its claim of coal use by providing worksheets and a reconciliation that illustrated how costs were reported for coal consumption during the POI. See 1st Supplemental Questionnaire at 1-2. Additionally, the Department re-opened the record of the investigation to all interested parties in order to obtain the most accurate information regarding the surrogate value for coal. Id. at 2.

On April 8, 2005, Hebei responded to the Department's request for additional information. See Response from Hebei to the Department, April 8, 2005 (1st Supplemental Response). Specifically, Hebei stated that it was unable to obtain any information from its subcontractor detailing the specific grade and/or type of coal it used for drying fence posts during the POI. See 1st Supplemental Response at 1. Hebei stated that it never kept such records in its ordinary course of business nor did its subcontractor, who used the coal in question during the production of fence posts during the POI. Hebei did not provide an industry expert chemical analysis demonstrating the UHV of the type and

grade of coal used during the POI because it stated that there was no existing sample of this coal, nor did Hebei keep samples of coal or records regarding coal used by its subcontractors. Id. at 2. With respect to the Department's request for a cost reconciliation, Hebei noted that all information regarding coal consumption was already verified by the Department in the course of the investigation. Id.

On April 15, 2005, Hebei responded to the Department's request for additional surrogate value information. See Response from Hebei to the Department, April 15, 2005 (2nd Supplemental Response). In this response, Hebei provided 2001/2002 TERI Data, which included contemporaneous domestic coal prices. See 2nd Supplemental Response at Attachment 1.

On April 26, 2005, the Department identified areas in Hebei's April 8, 2005, and April 15, 2005, submissions, for which it required further clarification. See Letter from the Department to Hebei, April 26, 2005 (2nd Supplemental Questionnaire). The Department asked Hebei to explain in detail the steps it took to contact its subcontractors in order to obtain information regarding the type and/or grade of coal used to dry fence posts during the POI. See 2nd Supplemental Questionnaire at 1-2. Additionally, the Department asked Hebei: 1) why it was not necessary for Hebei to know the quality specifications of the coal used to dry fence posts during the POI, 2) to submit any production records or other documents during the POI that would provide any details regarding the grade and/or type of coal used in the production of fence posts during the POI, 3) to identify what subcontractor Hebei currently uses to provide coal for the production of fence posts, and 4) provide the specific

standards or requirements regarding the quality, grade and/or type of coal Hebei had when selecting this new subcontractor. Id.

In the 2nd Supplemental Questionnaire, the Department also reiterated its request that Hebei provide detailed information regarding the type and/or grade of coal used by Hebei during the POI to dry fence posts. The Department asked again, what type or types of coal are standard in the production of fence posts in either India or the PRC. Finally, the Department asked Hebei, given the facts on the record, why the coal values in the 2000/2001 or 2001/2002 TERI Data provide a better surrogate value for coal than the value presented in the Indian Import Statistics. Id.

On May 2, 2005, Hebei responded to the Department's additional request for information. See Response from Hebei to the Department, May 2, 2005 (3rd Supplemental Response). Hebei noted that upon learning about the Department's supplemental questionnaire, it contacted its subcontractor by telephone and asked for the requested information. See 3rd Supplemental Response at 1. Hebei noted that there was no written correspondence related to this information request. Id. Hebei also stated that it could not obtain quality specifications regarding coal type and/or grade from its subcontractors because they had no concern about the method used to accomplish the drying of fence posts. Id. at 2. Hebei further stated that it is both unreasonable and irrational to assume that Hebei and its subcontractor would take interest in the grade, type or UHV of the coal used in the production of fence posts, but noted that presumably, the subcontractor used the least expensive coal available since drying a coating on fence posts does not require the generation of an excessive amount of heat or energy. Id. at 2-4. In the 3rd Supplemental Response, Hebei also stated that it had no production

records or other documentation that gave a description of the coal used to dry fence posts during the POI, and that there are no specific standards or requirements regarding the quality, grade and/or type of coal used to dry fence posts because it is a basic operation that does not require the generation of large amounts of heat. Id. at 3. Hebei provided two internet articles related to coating procedures illustrating the use of other energy sources to generate the heat as support for this claim. Id. at Attachment 1.

Finally, Hebei argued in its 3rd Supplemental Response that the prices in the 2001/2002 TERI Data accurately reflect domestic prices for coal in India, and noted the fact that the Court stated in Hebei Metals I that there should be a preference for domestic prices absent record evidence demonstrating that those domestic prices are distorted or otherwise inaccurate. Hebei contends that there is no evidence in this case suggesting that the TERI coal prices are distorted. Id. at 3-4.

On June 30, 2005, the Department identified areas in Hebei's May 2, 2005, submissions, for which it required further clarification. See Letter from the Department to Hebei, June 30, 2005 (3rd Supplemental Questionnaire). The Department asked Hebei detailed questions regarding the TERI Data Hebei placed on the record in this proceeding. Most notably, the Department asked Hebei whether or not the prices in the TERI Data include domestic duties and taxes.

On July 5, 2005, Hebei responded to the Department's additional request for information regarding the TERI Data. See Response from Hebei to the Department, July 5, 2005 (4th Supplemental Response). Hebei noted that it found no indication that the TERI Data is inclusive of domestic duties and taxes. See 4th Supplemental Response at 1.

On July 8, 2004, the Department placed on the record information obtained while conducting independent research on the TERI Data. See Memorandum from Salim Bhabhrawala to Wendy J. Frankel Re: Research Regarding TERI Coal Prices for the Remand of the Antidumping Duty Investigation of Lawn and Garden Fence Posts from the People's Republic of China (July 8, 2005) (Research Memo). The results of the Department's research are discussed below.

ANALYSIS

- A. *After conducting independent research on the specifics of the TERI Data, the Department finds that the 2001/2002 TERI Data is the best information on the record in this proceeding to value coal.*

The Department has a stated of practice of assessing surrogate value data and data sources on a case-by-case basis, and using where applicable, 1) investigation or review period-wide price averages, 2) prices specific to the input in question, 3) prices that are net of taxes and import duties, 4) prices that are contemporaneous with the period of investigation or review, and 5) publicly available data. See Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process (March 1, 2004).²

In accordance with the Court's instructions to determine the most appropriate surrogate value for coal in this proceeding, the Department conducted independent research to obtain comprehensive information on coal from the more recent 2002/2003 TERI Data. Additionally, the Department sent an email to TERI specifically asking the organization if the prices listed in its annual TERI Data publication

² Contrary to the Court's finding that the Department has a "conditional presumption in favor of domestic prices," the Department, with this remand, clarifies that it selects surrogate values on a case-by-case basis, as stated in Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process (March 1, 2004).

were net of duties and taxes. TERI responded by noting that the “prices are ex-pithead and do not include any taxes, duties, royalty etc.” See Research Memo at Attachment 2. The Department was able to determine, through its examination of the 2002/2003 TERI Data, that a) the annual TERI Data publication is complete and comprehensive because it covers all sales of all types of coal made by Coal India Limited and its subsidiaries, and b) the annual TERI Data publication prices are exclusive of duties and taxes. See Research Memo at Attachments 1 and 2. Therefore, the Department finds that, in this case, the contemporaneous 2001/2002 TERI Data best meets the Department’s criteria for selecting surrogate values and is the best information on the record to value coal in this redetermination.

B. No additional compelling information or evidence has been provided by Hebei regarding the type of coal used to produce subject merchandise or justifying the use of the TERI Data.

The Department pursued both directives issued by the Court, to: (1) seek evidence of the type of coal used by Hebei in its production process, and nonaberrational price data that best relates to this coal type, if the record does not already contain such data; or, if that is deemed impractical at this stage, (2) obtain evidence of the type or types of coal normally used for drying steel fence posts in the PRC or India, and non-aberrational price data that best relates to such coal type(s), if the record does not already contain such data.

First, the Department re-opened the record and directly asked Hebei, in its 1st Supplemental Questionnaire, what type or types of coal were used during the POI to dry fence posts. Hebei responded that it was unable to obtain this information and never kept such records in the normal course of business. The Department again asked Hebei what type and/or grade of coal Hebei used

during the POI in its 2nd Supplemental Questionnaire. Again, Hebei failed to provide the Department with this information in responding that it does not keep such records, and that there is “no rational reason to keep such records.” See 3rd Supplemental Response at 3. The Department also asked Hebei what type and/or grade of coal the subcontractor that Hebei uses now is utilizing currently to produce fence posts. Rather than responding directly to this question, Hebei simply repeated that “there are no specific standards or requirements regarding the quality, grade and/or type of coal used to dry fence posts.” See 3rd Supplemental Response at 3. In a further effort to adhere to the Court’s request to “seek evidence of the type of coal used by Hebei in its production process,” the Department again asked Hebei what type or types of coal are standard in the production of fence posts in either India or the PRC markets. See 2nd Supplemental Questionnaire at 2. Hebei responded by stating that “there is no industry standard for the type or grade of coal that should be used to dry a coating on fence posts.” See 3rd Supplemental Response at 3-4. Hebei further claimed that the “operation of drying a paint or other coating does not require the generation of large amounts of heat. *Presumably*, too much heat would burn the coating rather than drying it.” Id. at 3 [Emphasis added]. Hebei then stated that the drying operation would not require coal with a high UHV. Id. at 4. In its response, Hebei provided no affidavits or testimony from employees of its company officials, industry experts, or its subcontractor, to support these statements.

Within its 3rd Supplemental Response, Hebei did provide two internet articles to support its claim that “coating does not require the generation of large amounts of heat.” The first article was

published by Optimum Air Corporation in Canada regarding the temperature requirements for waterbourne coatings in convection ovens. The second internet article was published by Tech Solve Corporation in the United States regarding temperature requirements for the high-volume, low-pressure spray coating process. The submission of both of these articles was only partially responsive to the Department's request, which was made in accordance with the Court's explicit instructions to "obtain evidence of the type or types of coal normally used for drying steel fence posts in China or India." See Hebei Metals II at 23-24. Due to the fact that these submissions did not relate to the process of drying fence posts directly with heat generated by coal in the PRC or India, these articles have no probative value in this redetermination.

In Hebei Metals I, the Court agreed with the Department that Hebei did not provide record evidence demonstrating that the type or types of coal represented in the 2000/2001 TERI Data is no more or less accurate than the surrogate value of the Indian import statistics. See Hebei Metals I at 11-14. For example, the limited record that the respondent Chinese producers submitted to the Department during the investigation does not indicate exactly what type of coal fence post producers use, what the UHV of this coal is, and whether Indian fence post producers use domestic or imported coal in their manufacturing process. See Hebei Metals I at 14. In this remand proceeding, Hebei failed to provide any factual information indicating that it used a designated type or grade, or even a general category of coal, as laid out in the TERI Data, such as "*steam coal and rubble*," "*slack coal and washery middlings*," or "*run-of-mine coal*." After giving Hebei several additional opportunities to

place factual evidence on the record in this proceeding, the Department finds that the evidence regarding the definition of the respondent's coal use remains unclear on the record.

Moreover, the Department's independent research proved inconclusive as to the specific type of coal used to produce fence posts in either the PRC or India. The Department independently reviewed the 2002/2003 TERI Data, but could not uncover what grades, types or categories of coal were most appropriate for the production of fence posts or similar items. Further research of the Internet regarding this matter likewise proved fruitless.

Finally, when the Department re-opened the record to all interested parties, including Hebei, to submit evidence of non-aberrational price data that best relates to the type or types of coal used by Hebei during the POI, Hebei submitted the 2001/2002 TERI Data. As with the 2000/2001 TERI Data placed on the record by Hebei in the original investigation of this proceeding, Hebei again failed to identify the price data within the TERI Data that best relates to the type or types of coal used by Hebei during the POI.

Although the Department took painstaking efforts to allow Hebei several chances to identify any reasonable type and/or grade of coal used to manufacture fence posts, Hebei failed to produce any such information. In fact, there is no factual information from Hebei or its subcontractors in any of the four submissions made by Hebei in the course of remand regarding the type of coal used in the production of fence posts during, or even after the POI. Rather, Hebei merely provided unsupported suppositions and presumptions. As a result, the Department has no reliable information to determine

which specific category in the TERI Data is most representative of the coal used to dry fence posts and therefore the most accurate choice to value coal. Therefore, even though the Department gave Hebei ample opportunities to place new factual information on the record regarding its specific coal usage by type during or after the POI, pursuant to the Court's instructions, the Department concludes that no new supported factual information on the type or types of coal used by Hebei to produce fence posts has been submitted, or otherwise exists on the record.

C. Due to the fact that Hebei did not cooperate to the best of its ability to provide information regarding the type of coal it used or justify the use of specific categories of the TERI Data, adverse facts available is warranted.

Section 776(a) of the Tariff Act of 1930, as amended (the Act), provides that if necessary information is not available on the record, or an interested party or any other person (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority shall, subject to section 782(d), use facts otherwise available in reaching the applicable determination.

We conclude that, within the meaning of sections 776(a)(1) and (2)(A) of the Act, necessary information is not available on the record and that Hebei has withheld information that was requested by the Department in numerous supplemental questionnaires, despite the fact that the Department extended

the opportunity for Hebei to submit factual information and comment to the record, as ordered by the Court in this proceeding. Therefore, the use of facts otherwise available in determining the type and value of coal for producing subject merchandise is appropriate.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of the review. In this redetermination, the Department re-opened the record of this proceeding and issued a supplemental questionnaire to Hebei directing the company to “provide complete and detailed information regarding the type and grade of coal used by Hebei during the POI to dry steel fence posts.” See 1st Supplemental Questionnaire at 2. In response to the inadequate information provided by Hebei, the Department attempted to supplement the record with an additional questionnaire and provide yet another opportunity for Hebei to provide information about its coal usage during the POI. See 2nd Supplemental Questionnaire at 2. Accordingly, and pursuant to section 782(d) of the Act, the Department provided Hebei with numerous opportunities to remedy or explain the deficiency in its response on the record.

Section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department’s request for information. See also Statement of Administrative Action (SAA)

accompanying the Uruguay Round Agreements Act (URAA), H. Doc. No. 103-316 at 870 (1994).

This statutory provision requires the Department to assess “whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.”

See Nippon Steel v. U.S., 337 F.3d 1373 (Fed. Cir. 2003). The provision “does not condone inattentiveness, carelessness, or inadequate record keeping.” Id.

We conclude that, within the meaning of section 776(b) of the Act, Hebei failed to cooperate by not acting to the best of its ability to comply with the Department’s requests for information regarding the type of coal used in its production of subject merchandise. As a result, the Department concludes that the use of AFA is appropriate. Hebei was unresponsive to the Department’s questions concerning the type of coal used in fence post production. Hebei claimed that it telephoned its subcontractor to gather this information, but provided no documentation to support its claim. Hebei provided information from web-sites describing fence post production in Canada and the United States, but that information is not probative of fence post production in the PRC or India that uses coal as a heat source for drying. Hebei presumes that a fence post producer using coal would purchase the cheapest coal possible, arguing that fence post production requires a low UHV, but has provided no supporting documentation to support this presumption. The Department notes that it is also possible to presume that a producer would purchase high-quality, high UHV coal, allowing the producer to use less coal over a longer period than it would with the cheap, low UHV coal. In addition, Hebei brought this litigation against the Department and claimed that the TERI Data coal prices on the record of this

proceeding were more representative of the production experience of the PRC producer than the import prices the Department had used in the Final Determination. It is not unreasonable to expect that having made this claim, Hebei should be able to answer the Department's requests with regard to the grade and/or type of coal used to produce fence posts by the respondent, by a Chinese producer, or by an Indian producer. However, when the Department re-opened the record and allowed Hebei to clarify the details of its coal usage, it was unable to do so. Therefore, in light of Hebei's failure to put forth its maximum effort to provide full and complete answers to all of the Department's inquiries, and Hebei's inadequate record keeping, the Department determines that the application of AFA is appropriate.

D. The application of AFA.

In applying an adverse inference, the Department must consider that a respondent may not be rewarded for failing to cooperate and providing the agency with "flawed" information. See NSK Ltd. v. United States, 170 F. Supp. 2d 1280, 1312 (CIT 2001). In selecting among the adverse facts available, the Department is mindful that adverse facts selected "will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin." Reiner Brach GmbH & Co. v. United States, 206 F. Supp. 2d 1323, 1339 (CIT 2002), citing F.Liii De Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F. 3d 1027, 1032 (Fed. Cir. 2000).

Given the fact that Hebei has had ample opportunities to provide new factual information on the record indicating the type of coal it used, but has failed to do so, the Department has no information regarding which type of coal within the TERI Data should be used to value coal. We believe that the adverse inference should satisfactorily address Hebei's insufficient and/or confusing submissions and

ensure that Hebei “would not benefit from its lack of cooperation” in the redetermination. It would not be appropriate for the Department to reward Hebei by using the surrogate value recommended by Hebei, the TERI steam coal averages of grades A, B, C and D, when it provided no information on the record to demonstrate the appropriateness of this recommended surrogate value. Thus, in applying AFA, the Department finds it most appropriate to use the simple average of the highest coal grade, coal grade A, in the 2001/2002 TERI Data as the surrogate value for coal.³

COMMENTS

The Department issued a draft redetermination to Hebei on July 14, 2005, and provided an opportunity to comment. On July 19, 2005, Hebei provided comments on our draft results of redetermination. See Letter from Hebei to the Department, July 14, 2005 (Draft Remand Comments).

In its Draft Remand Comments, Hebei stated that it opposes the Department’s decision to resort to AFA and the Department’s determination that Hebei did not cooperate to the best of its ability to provide coal information. Hebei argues that it responded to the best of its ability to each and all of the Department’s requests for additional information on coal usage and information on the fence post industry in the PRC and India. Hebei also asserted again that the coal consumption reported in the investigation was supplied by an unaffiliated subcontractor which no longer has a business relationship with Hebei. Hebei argues that the Department failed to did not request this information in the course of the investigation, when Hebei was still in contact with its unaffiliated subcontractor. Hebei states that despite “repeated efforts to obtain the requested information, Hebei was unable to obtain such information at this time” and that

³ The Department notes that the 2001/2002 TERI Data only lists prices, not volumes of sales. Therefore, a simple average is being used to calculate the value of coal

Hebei should not be penalized for the Department's failure to request this information during the investigation, or for Hebei's inability to provide information that is not kept in the ordinary course of business. For these reasons, Hebei argues that the Department's determination to resort to AFA is unwarranted. See Draft Remand Comments at 1-2.

Department's Position: Having recognized that the record did not contain information regarding the specific type or types of coal used in the production of Hebei's fence posts, the Court provided an opportunity for the Department to re-open the record and solicit this information from Hebei and to supplement the record with additional information regarding 1) coal use in this industry in China and India and 2) the TERI data. See Hebei Metals at 11-14. In accordance with the Court's instructions, the Department re-opened the record to obtain such information. Given that Hebei litigated on the basis of what data is most representative of the type of coal used in the production of fence posts, it is not unreasonable to conclude that Hebei would in fact have available information regarding what type of coal is used in fence post production. Thus, the Department requested this information in an effort to identify the most representative surrogate value for coal. Specifically, the Department allowed Hebei ample opportunities to provide new factual information on the record indicating the type of coal it used during the POI, currently uses, or information regarding what type or types of coal is (are) used in the PRC or India generally for fence post production. Notwithstanding these opportunities, Hebei failed to provide such information, and has not provided sufficient information to substantiate its claim regarding which are the most appropriate TERI data to use as the coal surrogate value. Therefore, the Department has determined that the application of AFA is warranted with respect to this issue.

RESULTS OF THE REMAND

After conducting independent research on the annual TERI Data publication, the Department has determined that the 2001/2002 TERI Data is the best available information to value coal used in fence post production, in this case. As described above, because Hebei failed to provide information regarding its coal use, and failed to cooperate to the best of its ability to provide the Department with the most accurate value for coal, in accordance with the Department's request, the Department has determined that the application of AFA is warranted. As AFA, the Department will value coal with the simple average of the highest coal grade within the contemporaneous 2001/2002 TERI Data.

Therefore, as a result of its recalculation of the adjustment to the value of coal, in accordance with the Court's orders, the recalculated weighted-average margin for the period October 1, 2001, through March 31, 2002, is as follows:

| Manufacturer/exporter | Weighted-Average Margin (percent) | | |
|---|-----------------------------------|-----------------|------------------|
| | <u>Final Determination</u> | <u>Remand I</u> | <u>Remand II</u> |
| Hebei Metals and Minerals Imports and Export Corporation | 6.60 | 6.52 | 6.49 |

These final results of redetermination pursuant to remand are in accordance with the Court's instructions in Hebei Metals & Minerals Import & Export Corporation and Hebei Wuxin Metals & Minerals Trading Co., Ltd. v. United States, Slip Op. 05-32 (Ct. Int'l Trade March 10, 2005).

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

Date